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Review of “A History of Lay Judges,” By John P. Dawson

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BOOK REVIEWS

A HISTORY OF LAY JUDGES, John P. Dawson. Cambridge: Harvard University Press. 1960. Pp. x, 310. \$6.50.

Professor Dawson continues to amaze. In a two year period during which he has got out two casebooks and delivered the Cooley lectures at Michigan, he has managed also to produce the best book on English legal history to come out of an American law school for some time (needlessly faint praise: it is a very good book). Even more astonishing, it is, in part, a book of comparative legal history, and is based on the relevant source materials from France and Germany. This is a field (law) where an artful arrangement of the cullings by some research assistants from the West Publishing Company's ample stores is regarded as erudition. Moreover, the citations apparently are there because they are relevant, and not merely because they are to works in German.

The title, it must be said, is misleading. This is not a history of lay judges—that surely would be a task beyond even Professor Dawson's powers, anyway in 300 pages (though one heartily wishes he would give it a try). Rather, it is, in form, an essay in which a thesis is advanced for the reasons for the development of the use of lay judges—particularly the jury—in England and their disappearance in France and Germany. To this is appended a monograph on the work of one manor court—that of Redgrave in Suffolk (a manor that once belonged to the Bacons and passed from their lands into those of the descendants of Chief Justice Holt—it is surely a happy chance that brought precisely those records to Professor Dawson's attention).¹

The thesis is, briefly (and probably not too accurately because briefly), that throughout the Germanic kingdoms of Europe the basic pattern of adjudication at the beginning of the Medieval period—say the 11th century—was similar to that with which we are familiar in England. Courts consisted of members of the social group to which the parties belonged (who might be anything from peers of the realm to something close to serfs). The members came from the particular geographical unit (which again might be anything from the Holy Roman Empire to a hundred) in which the parties lived. The court

1. There is also a brief introductory section on lay judges in Athens and Rome, but this does not seem to me to be very relevant since the legal systems he is principally talking about were all Germanic in origin. Insofar as they were influenced by Roman procedure, it was by the procedure of the later Empire, especially by way of church courts, and not by the earlier bifurcated system of praetor and iudex.

itself was relatively passive and simply watched to see that the parties observed the traditional intricate procedures, including precise repetitions of certain formulas (best illustrated, perhaps, in *Njal's Saga*). The proof, if the case ever got that far, would consist of something like an ordeal, trial by battle or the giving of oaths. It would be, in other words, by our terms, irrational, and by any terms, cumbersome. This procedure was unsatisfactory, especially after the Church began to discourage ordeals and trials by battle, and as the central governments began to establish courts in the twelfth and thirteenth centuries, first in England, and then in France, it began to be replaced by more "rational" methods of proof. It was here, however, that there were differences. In England, the trial method selected by the crown for use by its growing courts was the jury. This developed, probably, out of the old Frankish inquest since it consisted at first of the king's officers questioning the residents of particular areas about various matters such as land-holding, crimes, etc. The bulk of the trial—the finding of facts—was carried on not by the judge but by the jury. The Bench in England remained very small (as it does still), but it was, nevertheless, able to supplant the old local and the newer feudal jurisdictions in most instances. In France, though almost the same background existed, this did not occur. Instead, the new royal courts began to use the canonist procedure in which facts were determined by the questioning of witnesses in secret under oath by the judges. Generally the witnesses were brought before the court by the parties. A development similar to that of France took place in Germany two centuries later in the fifteenth and sixteenth centuries.

It is Professor Dawson's thesis that this difference in development is the result of the existence in England of a strong central government which could generally enforce obedience by its subjects throughout the kingdom, and which could, in consequence, force small groups of its subjects to come to a central place to answer questions about crimes or other matters arising in their neighborhoods despite their great unwillingness to do so. This was not the situation in France where the king's authority was frequently non-existent in fact, though he was the nominal ruler. He had, of necessity, to rely on his own employees and to have them question such witnesses as the parties brought to them (remembering that criminal trials were also usually private prosecutions)—it would not normally be necessary for the court to force any witness to come before it. Once these decisions were made—and they were made more or less unconsciously—they affected all subsequent developments in both countries. The English tended to keep the paid officials at a minimum, and to use laymen widely, even in Equity when it developed, whereas in France the increase of judges

and minor judicial officials is notorious (and Professor Dawson gives some horrible examples in case it is not).

The thesis is a very interesting one, since it offers a novel approach to the problem of the difference in legal development between France and England, and it is probably a very fruitful one. By this route one might well arrive at some answer to the question—which seems to me to be of overriding importance—why the Common Law has seemed to be the legal system most hospitable to the development of liberty (and Professor Dawson gives a few pointers). To be sure, he has not proved his thesis. It is not the sort of thesis that can be proved. It would be necessary, for one thing, to examine a number of other countries which had similar backgrounds—Switzerland, Holland, Flanders, and Scandinavia for some—to see what happened there. Moreover, “France” is probably not an entirely proper subject for investigation. It would seem to be necessary to investigate different parts of France separately, for though the central government was frequently weak the major feudatories were usually not. After all, at least one province, Gascony, was, during almost all the relevant time, in English hands. What happened to the procedure there? Germany, of course, is even less of a unity, as Professor Dawson points out. The path of such an investigation is well laid out, however. Professor Dawson has given a very complete summary of English developments and an excellent introduction to those in France and Germany. He has, in other words, done a more than satisfactory job in making a *prima facie* case for an arresting and important thesis.

He has done quite a lot more too. For one thing, in the process of explaining the English developments, he has written the best short account of the development of the English judicial system that I have seen, and has gone a good way towards writing a history of the procedure of the English trial (a very murky area indeed). Perhaps most important, his book is based almost entirely on secondary authorities.² This means that he has done the immensely valuable job of synthesising what almost all the important legal historians of three countries (counting the United States and Britain as one) have had to say about this aspect of their histories. If anyone should be interested in pursuing the matter further, his path is well laid out. Moreover, Professor Dawson's familiarity with continental developments permits him to look more clearly at the English scene,³ and in general his development

2. A notable exception is his reference to the practice of the English Chancellor during the sixteenth century of using arbitration for which he makes reference to the original records of the court. Pp. 163-69. And, of course, the last section of the book on the Redgrave Manor materials is entirely based on original records.

3. See, for example, the light he casts on the extremely vexing problem of the influence of canonist procedure on Equity procedure. Pp. 146-59.

of the general background from secondary sources points up to the original sources that he does use.

There are, the conscientious reviewer is pleased to note (and thereby save a shred of his self-respect), a few errors in the book. Thus English peers no longer have a right to be tried in the House of Lords, having lost it in 1948.⁴ I might add that it seems to me that his references to the advantages which the royal courts had over others because they had the jury as opposed to wager of law, overlook the fact that many Englishmen much preferred wager of law, and perhaps not entirely irrationally.⁵ Doubtless there are a number of others which a more careful and more erudite reader than I would pick up, and doubtless too, they are equally unimportant. What should be emphasized, it seems to me, is how many insights into legal history, especially, though not entirely, the Common Law, one gets on almost every page—not least because of the fact that equal treatment to that given to the royal courts is given to the local courts. It is a book, in short, to read and reread—that is, at any rate, what I intend to do with it.

And yet, of course, no one to speak of will read it, and of those who do, it is likely that no one will do with it what should be done—tear it apart; build on it; disagree with it; entirely disprove it;—principally—use it. Professor Dawson's thesis is not so startling as Professor Tawney's, and hence not likely to start a major battle,⁶ but it is sufficiently novel to justify some spirited skirmishes. There will not be any, however. English legal history is neither taught nor studied in American law schools⁷ (neither is American legal history but that is another, almost more disheartening, story). Several of the larger law schools (to say nothing of the smaller) have no one on their faculties

4. Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, § 30.

5. See, for example, Professor Dawson's statement on p. 185 that the royal courts had an advantage over seignorial courts in that they had the "special attraction of jury trial." In the borough, at least, the compurgatory oath, even in criminal matters, was a fiercely prized right. When one considers the close-knit nature of medieval urban society, it is perhaps not hard to understand why it should be thought better to have available the right to escape punishment if a sufficient number of one's fellow citizens (whom one had chosen) would uphold one's oath, rather than to be left to the result of forced questioning of a miscellaneous group. The worthies of the town would be unlikely to support with oaths a known wrongdoer unless they approved the wrong, and they would be likely to know the facts. See 2 Selden Society, *Borough Customs* xxvii-xxxiii (Bateson ed. 1906).

6. See Hexter, *Storm over the Gentry*, Encounter, May 1958, p. 22.

7. One has nowadays a slightly sour sensation when reading Maitland's introduction to volume 1 of the Selden Society's edition of the Yearbooks of Edward II (1903), in which he laments that it may be necessary to send English scholars to this side of the Atlantic (to Harvard) to be trained in the old English law (p. xxxii).

who is qualified to teach it, and no one tries—although most such schools have rather valuable library collections for its study, and would make quite strenuous and expensive efforts to repair any gaps that might be uncovered in them. The worship of our ancestors is apparently in the debased form in which only the idols remain—well preserved and cared-for, but with even their names unknown. Perhaps it is as well. On the one hand, the law schools can concentrate on such practical matters as “legal medicine” (How to Fake a Back Injury to the irreverent), while on the other, there are the rich fields of interdisciplinary research, to say nothing of International Legal Studies.

But to carp like this is to be ungrateful.⁸ One should be very thankful that there is at least one such person as Professor Dawson, and that he has given us this fine book. Though it is not being too greedy, I trust, to hope that he might sometime follow it up with another on the same subject.

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THE SUPREME COURT OF THE UNITED STATES. Paul A. Freund. Cleveland, Ohio: Meridian Books. 1961. Pp. 224. \$1.35.

Prominently mentioned among the candidates to ascend to the recent vacancy on the Supreme Court was Professor Paul Freund of the Harvard Law School. Although President Kennedy's first appointment went to Deputy Attorney General White, it is quite possible that Professor Freund may yet participate in the Court's deliberations—both because of his undisputed eminence in the area of constitutional law, and also his long established association with the President as a legal advisor. Thus, his most recent work, *The Supreme Court of the United States*, is deserving of attention not only as an excellent analysis of the Court's role in our national life, but also as a guidepost in predicting future judicial behavior.

There can be little doubt that Professor Freund is not in alliance with that wing of the Court which speaks in terms of absolutes when considering cases involving the Bill of Rights.¹ The disharmonies between his position and that viewpoint which is generally attributed to the “activist” wing would not, I believe, proceed along channels of judicial restraint, as expounded by Justice Frankfurter and Judge Hand,² but rather find their source in a respect for a balancing or

8. Though I think it is justified to carp at the fact that there is no bibliography.

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1. Mr. Justice Black's adherence to an interpretation of the Bill of Rights as unmistakably absolute is contained in Black, *The Bill of Rights* 35 N.Y.U.L. REV. 865 (1960).

2. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 87-91 (1961) [herein after cited as FREUND]. See, for example, the concurring opinion of Justices